

Memorandum

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State Water Resources Control Board
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Comments on the State Water Resources Control Board Water Rights Process and Procedures

Thank you for the opportunity to comment on the State Water Resources Control Board water rights process and procedures. Because of our overlapping responsibilities, the Department of Water Resources has closely been involved in numerous Board hearings and processes. Within the past decade, the Department has participated in the Bay-Delta hearing, the hearing for the 1995 Water Quality Control Plan for the Bay-Delta, the Delta Wetlands hearing, and several water transfer matters, including those involving the Natomas Central Mutual Water Company and Yuba County Water Agency. The Department also has the general statutory authority to participate in matters before the Board.

Based on our participation, we observe in general that the Board (and its staff) discharges its responsibilities in a manner consistent with the law, conducts its water rights hearing in a fair, professional manner, and regulates the State's water resources in a way that furthers the public interests. We have several specific suggestions for improvements.

1. Hearing Rules: Reexamine the Board's Interpretation of Ex Parte Communication Rules.

The Department believes the Board should reexamine its position on ex parte communications. As we understand the Board's interpretation of the ex parte communication rules, both Board members and staff are prohibited from having contact with parties during water rights hearings. For example, the notice for the Bay-Delta hearing provided that during the pendency of that hearing, no ex parte communications between parties and the Board and the staff were permitted on substantive matters. Because of the virtually continuous nature of the Bay-Delta process, this interpretation essentially precludes all contacts between parties and the Board and staff on Bay-Delta matters for significant periods of time. The Department believes that such a strict reading of the ex parte communication rules is not in the public interest, because it reduces the ability of the public and parties to seek assistance from the Board and staff on

complicated water rights issues and to work toward resolving problems. We also believe that the Board's position on ex parte communications is not legally required in certain circumstances and that the Board and the staff have more latitude to meet with parties without violating ex parte communication rules than has been shown in the past.

This issue most recently came up during the Bay-Delta hearing when the Department staff wished to consult with Board staff about possible methods to improve the Delta water quality monitoring program contained in Decision 1641 and the 1995 Water Quality Control Plan for the Delta. A review of the monitoring requirements had been noticed as part of Phase 8 of the Bay-Delta hearing. Because of the ex parte prohibitions as interpreted by the Board, the Department was prevented from consulting with Board staff on this matter. The effect of this prohibition was that the Department was unable to consult with Board staff on this highly technical, important subject. As a result, we believe the public was not well served. The staff is in a unique position to contribute technical suggestions to parties. The inability to communicate with parties severely limits the ability of other agencies like the Department from using Board staff expertise.

The California Administrative Procedure Act (APA) sets forth the legal restrictions on ex parte communications for State agencies involved in adjudicative proceedings. (Gov. Code § 11430.10 et seq.) The APA provides that while the proceeding is pending, no ex parte communication is permitted between "the presiding officer . . . from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code section 11430.10(a).) As defined by the APA, "presiding officer" means "agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in the adjudicative proceeding." (Gov. Code §11405.80.) We interpret the term "presiding officer" to mean the Board, and not Board staff. (Gov. Code §11430.10.) In our view, the APA thus permits Board staff to consult with parties in hearings both while the hearings are not taking place *and* also during their pendency.

We are also supportive of the Board members themselves being more accessible to the public and parties. We believe public access is important because it contributes to informed decision-making by the Board and allows the Board to better understand the positions of the parties. Although we believe that ex parte contact with Board members during the pendency of hearings on substantive issues does raise issues relating to the APA ex parte communication rules, we believe that access to Board before and after the hearings is permitted. During hearings, we are also supportive of increasing public contact with the

Board through noticed meetings, settlement conferences, and workshops that may be attended by any party, and thus which will not run afoul of the APA.

Although we understand the need for the Board to fully comply with ex parte communications rules, we believe it has gone beyond what is required by the law to the detriment of the water rights process. We request that the Board reexamine its ex parte rules with the goal of providing additional public access to the Board and staff.

2. Hearing Rules: Cross-Examination.

The Department is supportive of Board efforts as reflected in its regulations to ensure the cross-examination is permitted consistent with due process and APA requirements. Simultaneously, we are also supportive of Board efforts to ensure that all cross-examination is relevant as required by the APA and is not repetitive. Holding parties to the relevancy standard is especially important for the complex, multi-party hearings that are frequently heard by the Board. When the relevancy requirements are not adhered to, the cross-examination becomes needlessly lengthy, which neither serves the interests of the Board nor of the parties.

We are supportive of Board efforts to ensure that the cross-examination is relevant. Specifically, we support reasonable time limits on cross-examination (for instance, one hour per witness) with an offer of proof at the end of the timer period if the cross-examiner wishes to continue subject to the discretion of the hearing officer. We also request that the Board rules encourage parties with similar interests to coordinate cross-examination where possible to avoid duplicative questioning. We also support efforts by the Board hearing officers to hold cross-examiners to the relevancy requirements.

3. Enforcement: Term 91 Compliance.

Term 91 refers to the standard water rights term for certain diverters within the Sacramento-San Joaquin watershed that requires that holders of this term stop diverting when certain conditions are met upon notice from the Board. Specifically, Term 91 is applied when the Delta is in balanced conditions and the State Water Project and the Central Valley Project are releasing supplemental (stored) water to achieve the Delta water quality objectives. The Board issues the Term 91 notice, and the issuance is coordinated among the Board, the Department, and the Bureau of Reclamation. A copy of the notice issued in 1997 is attached.

It is important that the Term 91 notice be complied with to make sure that the Delta objectives are achieved. However, because of the large number of diverters frequently receiving notices and the limited period the notices are in effect, it is difficult to access whether Term 91 notices are actually being followed. For instance, in 1997, 85 diverters received Term 91 notices for about a two-month period. In 1999 and 2000, the Department has been informed that Board staff undertook spot investigations of some diverters who received Term 91 notices and found some noncompliance. We believe that a minor change to the process could improve the ability of the Board to enforce Term 91 requirements.

Included in the notification is a certification form that permits the diverters to continue diverting if there is a section of river between the diversion point and the Delta where no visible stream exists. In order to better access the level of compliance, DWR suggests that the certification be modified to also require that all diverters certify that they have stopped their diversions during the required period if they cannot certify that no visible stream exists. This information will be helpful to the Board to better gage the effectiveness of Term 91. If a diverter fails to complete a certification form, this would raise compliance issues that may merit further follow up by the Board or the Department. We believe our suggestion imposes only a modest increase in burden on the diverters, which is significantly outweighed by the potential enforcement benefit and the improvements in meeting the Delta objectives.

Thank you for permitting DWR to provide comments on Board processes. If you have any questions, please contact me at (916) 653-5129.

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Enclosure